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TEO SOON KIAT & ANOR v. PP

HIGH COURT SABAH & SARAWAK, LIMBANG
ALWI ABDUL WAHAB JC
[CRIMINAL APPEAL NO: LMN-41-1-11-2017]
13 DECEMBER 2017

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CRIMINAL PROCEDURE: *Stay of execution – Application for stay of sentence pending appeal – Applicants convicted and sentenced to fine of RM100,000 in default of 12 months' imprisonment – Applicants detained for failure to pay fine – Whether length of term of imprisonment ought to be considered in granting stay – Whether stay should not be allowed unless fine paid in full or by instalments – Whether Khairuddin Abdul Majid v. PP applicable – Criminal Procedure Code, ss. 283 & 311*

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The applicants were convicted and sentenced to a fine of RM100,000 in default of 12 months' imprisonment ('the sentence') by the Magistrate. They filed their appeal against the sentence. However, the applicants were not able to pay the fine and were detained in default of paying the fine. By way of notice of motion, both the applicants applied for an order to stay the sentence. It was argued by the applicants, in considering whether the stay ought to be granted, that the court should consider the length of the terms of the imprisonment in comparison with the length of the time which was likely to be taken for the appeal to be heard. It was further submitted that if the hearing of the appeal was to take a few months to be heard, then it would have defeated the purpose of the appeal as default sentence runs with immediate effect for 12 months' period. The prosecution ('DPP') however submitted that pursuant to s. 283 of the Criminal Procedure Code ('CPC') and the case authority of *Khairuddin Abdul Majid v. PP*, the stay should not be allowed unless the fine was paid by the applicants. Hence, the applicants should be ordered to pay the fine in full or by way of instalments.

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Held (allowing applicants' notice of motion; releasing applicants on cash bail of RM5,000 with one surety each):

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(1) Having read s. 283 of the CPC and the case of *Khairuddin Abdul Majid v. PP*, the court disagreed with the DPP's contention that the stay could only be given if the fine was paid in full or by way of instalments pending appeal. The case of *Khairuddin Abdul Majid v. PP* could be distinguished with the present case. In the present case, there was no instalment scheme offered to the applicants under s. 283(1)(b)(ii) of the CPC either by the court or by the prosecution. The appellants had no option but to pay in full otherwise they would have to serve the default sentence. *Khairuddin Abdul Majid v. PP* was not the authority to say that the stay of execution of fine could not be allowed unless the sentence of fine was paid. (paras 7 & 8)

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(2) The application for stay serves no purpose if the applicants were ordered to pay the fine pending the appeal. Section 283 of the CPC provides for the manner on how the fine is to be paid in the absence of any express provision under any law for the time being in force in respect of any fine imposed under such law. It did not actually provide that the payment of fine must be paid before the stay of execution was allowed. (para 9)

(3) Section 311 of the CPC is a special provision to stay execution on any judgment, order, conviction or sentence pending appeal. Here, the stay application was in respect of the sentence of fine on the ground that the applicants were not able to pay the fine, therefore, served the default sentence of 12 months' imprisonment. As the length of time to hear the appeal may take few months from now, the appeal, if allowed would be rendered nugatory since the applicants would have already served a certain period of imprisonment. Based on the forgoing reasons, the applicants' notice of motion ought to be allowed. (paras 10 & 12)

Case(s) referred to:
Dato' Seri Anwar Ibrahim v. PP & Another Appeal [2004] 1 CLJ 592 CA ***(refd)***
Khairuddin Abd Majid lwn. PP [2006] 1 LNS 280 HC ***(dist)***

Legislation referred to:
Criminal Procedure Code, ss. 283(1)(b)(ii), 311

For the applicants - Francis Wee; M/s Wee & Partners
For the respondent - Wan Mohd I'zzat Wan Abdullah; DPP

Reported by Sandra Gabriel

JUDGMENT

Alwi Abdul Wahab JC:

[1] By way of notice of motion both the applicants applied for an order to stay the sentence of a fine of RM100,000 in default 12 months' imprisonment imposed by the learned Magistrate at Limbang Magistrate's Court on 29 November 2017.

[2] The motion is supported by the affidavit of Mr Francis Wee affirmed on 6 December 2017. Both the applicants have filed their appeal against the sentence on 30 November 2017. Both the applicants were not able to pay the fine as a result of which they being detained in default of paying the fine.

[3] Learned counsel for the applicants submitted that there are special circumstances for the stay of execution as both applicants were unrepresented at the defence stage when the court rejected Mr Francis's application for an adjournment as he was having another matter in Kuching on the same date. As both the applicants were unrepresented, they chose to remain silent when

A they were called to enter their defence despite that they were represented throughout the prosecution's case. Both applicants were then convicted and sentenced to a fine of RM100,000 in default of 12 months' imprisonment accordingly.

B **[4]** It was argued by counsel for the applicants, in considering whether the stay ought to be granted or otherwise, there are certain factors to be considered which are by no means exhaustive (*Dato' Seri Anwar Ibrahim v. PP & Another Appeal* [2004] 1 CLJ 592). One of the factors to be considered by the court is that the length of the terms of the imprisonment in comparison with the length of the time which is likely to be taken for the appeal to be C heard.

[5] It was further submitted that if the hearing of the appeal is to take a few months to be heard, then it would have defeated the purpose of this appeal as default sentence runs with immediate effect for 12 months' period. The learned DPP despite tendering his written submissions on the eve of the D hearing of this notice of motion applied for this matter to be adjourned to February 2018 to allow for the Customs DPP to appear in person.

[6] I proceeded to hear this motion since both parties have prepared and filed their submissions notwithstanding the fact that submissions were filed late. In the learned DPP's submissions, he submitted that pursuant to s. 283 E of the Criminal Procedure Code and the case authority of *Khairuddin Abdul Majid lwn. PP* [2006] 1 LNS 280, the stay shall not be allowed unless the fine is paid by the applicants. Hence, the applicants should be ordered to pay the fine in full or by way of instalments.

F **[7]** Having read s. 283 of the CPC and the case law cited by the learned DPP, with respect, I disagree with the learned DPP's contention that the stay can only be given if the fine is paid in full or by way of instalments pending appeal. *Khairuddin*'s case *(supra)* cited by the DPP can be distinguished with the present case. In *Khairuddin*'s case *(supra)*, the sentence of fine handed down by the Sessions Court was allowed to be stayed by the learned Sessions G Court Judge pending appeal. The stay in the Sessions Court therein was allowed despite the suggestion by the prosecution to the court for the fine to be paid by way of instalments pursuant to s. 283(1)(b) of the CPC. Dissatisfied with the order of stay given by the learned Sessions Court Judge, the DPP crossed-appeal to the High Court. The High Court having heard the H DPP's appeal allowed it and ordered that the fine to be paid by the appellant therein by six months' instalments.

[8] In the present case, there was no instalment scheme offered to the applicants under s. 283(1)(b)(ii) of the CPC either by the court or by the prosecution. The appellants have no option but to pay in full otherwise they I have to serve the default sentence. The *Khairuddin*'s case *(supra)* is not, in my view, the authority to say that the stay of execution of fine cannot be allowed unless the sentence of fine is paid.

[9] In my view, the application for stay serves no purpose if the applicants were to be ordered to pay the fine pending the appeal. I am also of the view that s. 283 of the CPC provides for the manner how the fine is to be paid in the absence of any express provision under any law for the time being in force in respect of any fine imposed under such law. It does not actually provide that the payment of fine must be paid before the stay of execution is allowed.

[10] In my view, s. 311 of the CPC is a special provision to stay execution on any judgment, order, conviction or sentence pending appeal. Here, the stay application is in respect of the sentence of fine on the ground that the applicants were not able to pay the fine, therefore, served the default sentence of 12 months' imprisonment. As the length of time to hear the appeal may take a few months from now, the appeal, if allowed would be rendered nugatory since the applicants would have already served a certain period of imprisonment.

[11] In the present case, there is merit in the appeal in regards to the issue of non-representation of both applicants at the defence stage when there were legally represented throughout the prosecution's stage.

[12] Based on the foregoing reasons, I allowed the applicants' notice of motion to stay the execution of fine. I ordered both the applicants to be released on cash bail of RM5,000 each and both applicants are also ordered to produce one surety each.